87-817

Supreme Court, U.S.
FILED
NOV 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BARRY E. BAYER,

Petitioner,

v.

JUDITH PAYNE, Secretary of Revenue for the STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

DID THE SOUTH DAKOTA SUPREME COURT DEPRIVE PETITIONER BAYER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW WHEN THE COURT DENIED PETITIONER BAYER ACCESS TO THE STATE COURTS TO RECOVER TAXES PAID PURSUANT TO A PLEA BARGAIN AND SENTENCE FOR FAILURE TO FILE RETAIL SALES AND SERVICE TAX RETURNS ON BOOKMAKING OPERATIONS WHEN THE JUDGMENT OF CONVICTION IN ISSUE WAS VACATED ON THE GROUNDS THAT THE DEPARTMENT LACKED THE AUTHORITY TO TAX BOOKMAKING?

Petitioner, Barry E. Bayer, has at all times been a party to this litigation. Petitioner will be referred to as "Bayer." Respondent, Judith Payne, is the former Secretary of Revenue for the State of South Dakota. The South Dakota Department of Revenue will be referred to as "Department."

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OPINIONS BELOW

The August 19, 1987, opinion of the South Dakota Supreme Court in Bayer v. Payne, is reported at 411 N.W.2d 129 (S.D. 1987), and appears in the Appendix (A-2). The October 9, 1986, memorandum opinion of the South Dakota Circuit Court, Second Judicial Circuit, is not reported but appears in the Appendix (A-20).

NO. _____

IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

The decree of the South Dakota Supreme Court of which Petitioner seeks review was entered on August 19, 1987. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any

person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. South Dakota Codified Laws Annotated, Section 10-55A-1 (1982):

A person seeking recovery of tax imposed by chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A or 10-52 shall follow the procedure established in this chapter. No court has jurisdiction of a suit to recover a tax imposed by chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A or 10-52 unless the person seeking the recovery of the tax complies with the provisions of this chapter.

4. South Dakota Codified Laws Annotated, Section 10-55A-3 (1982):

No court may restrain or delay the collection and payment of a tax imposed by chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A or 10-52. A person shall pay the taxes when due and may seek recovery as provided in this chapter.

STATEMENT OF THE CASE

Although the South Dakota Constitution prohibits the South Dakota Department of Revenue (Department) from taxing bookmaking, the Department has collected sales tax on Petitioner Bayer's bookmaking activities. The South Dakota Supreme Court has stated that "it is not completely clear whether bookmaking would be a criminal offense under the South Dakota Code." Bayer v. Johnson, 400 N.W.2d 884, 886 (S.D. 1987). The court, however, has concluded that public policy justifies denying Bayer access to the South Dakota courts to recover sales tax paid on bookmaking activities.

The taxes which Bayer seeks to recover in this action were paid pursuant to a 1981 plea bargain after Bayer was criminally charged with failure to file retail sales and service tax returns on his bookmaking operations. In Bayer v.

Johnson, 349 N.W.2d 447 (S.D. 1984), a case identified by the South Dakota Supreme Court as Bayer I, the South Dakota Supreme Court concluded that the Department did not have the power to tax bookmaking because the South Dakota Constitution provides that the Legislature shall not authorize any game of chance. See S.D. Const. Art. III, §25. After the South Dakota Supreme Court issued its decision in Bayer I, the Magistrate Court for the Second Judicial Circuit vacated Bayer's 1981 Judgment of Conviction for failure to file sales tax. (A-62). The Magistrate Court also ordered the State and Department to refund the taxes Bayer had paid pursuant to the 1981 plea bargain and sentence. (A-64).

In State v. Bayer, 378 N.W.2d 223 (S.D. 1985), (A-33), a case identified by the South Dakota Supreme Court as Bayer II, the court held that the magistrate did

not have jurisdiction to return the sales tax paid pursuant to the 1981 plea bargain and sentence and that the recovery of sales tax must be pursued through the procedure set forth in the taxation statutes, S.D. Codified Laws Ann. ch. 10-55A (1982). Bayer then filed with Department a Petition for Recovery of Sales Tax Imposed Contrary to the South Dakota Constitution. The Department summarily denied the Petition on April 22, 1986. (A-29). Bayer appealed the April 22, 1986, Order to the Second Judicial Circuit.

The circuit court held that the payments Bayer made pursuant to the 1981 plea bargain were compulsory but that the plea bargain did not preclude Bayer from seeking recovery through the procedures established by the taxation statutes. The circuit court then concluded that the three-year statute of limitations for

recovering sales tax had run and that the statute of limitations had not been tolled. (A-21, 22). The circuit court entered an Order of Dismissal on December 22, 1986 (A-27). Bayer filed an amended notice of appeal from the order to the South Dakota Supreme Court on the same day.

On February 11, 1987, the South Dakota Supreme Court issued its opinion in Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987), a case identified by the court as Bayer III. In Bayer III, Bayer sought recovery for taxes paid under protest on his bookmaking activities. In that case, the South Dakota Supreme Court held that based on public policy, Bayer is denied access to the courts to recover the taxes paid on his "possibly criminal activity." Id. at 886. Neither party had ever raised this public policy issue and neither the

circuit court nor the Secretary of Revenue had ever addressed this issue.

After the court denied Bayer's petition for rehearing in Bayer III, Bayer filed a Petition for Certiorari, No. 86-2049, with the United States Supreme Court on June 15, 1987. The United States Supreme Court denied the Petition for Certiorari on October 5, 1987. Bayer filed a Petition for Rehearing from the Order on October 29, 1987.

On August 19, 1987, the South Dakota Supreme Court issued its 3-2 opinion in the case at hand, Bayer v. Payne, 411 N.W.2d 129 (S.D. 1987), (A-2). In this case, which no doubt, will come to be known as Bayer IV, the majority held that its decision in Bayer III was controlling and again held that public policy justified denying Bayer access to the courts.

In his appellant's and reply briefs to the circuit court and state supreme court, Bayer raised the issue that the refusal to refund the taxes in issue constitutes a taking of Bayer's property without due process contrary to the Fifth and Fourteenth Amendments to the United States Constitution. Neither the circuit court nor the South Dakota Supreme Court addressed these issues. The federal questions involved in this petition, however, were raised in a timely and proper manner so as to give this Court jurisdiction to review the August 19, 1987, order from the South Dakota Supreme Court.

In addition, after the South Dakota Supreme Court decided Bayer III, the decision upon which the South Dakota Supreme Court relied in the case at hand, Bayer petitioned the South Dakota Supreme Court for rehearing. In that petition for

rehearing, Bayer raised the federal question presented in both Bayer III and the case at hand.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE SOUTH DAKOTA SUPREME COURT HAS ADJUDICATED PETITIONER'S RIGHTS IN A MANNER WHICH VIOLATES THE UNITED STATES CONSTITUTION AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Introduction.

This case presents the issue of whether the South Dakota Supreme Court deprived Bayer of his due process rights by denying him access to the state courts to recover taxes and penalties paid pursuant to a Judgment of Conviction that was subsequently vacated on state constitutional grounds. The Judgment of Conviction was based on a plea bargain and sentence for failure to file retail sales and service tax returns on bookmaking

operations and was vacated on the grounds that the Department lacked the authority to tax bookmaking. On June 15, 1987, Bayer filed a Petition For Writ of Certiorari with this Court in Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987) (Bayer III). In this Petition, No. 86-2049, Bayer presented the issue of whether the South Dakota Supreme Court deprived Bayer of his due process rights when the court determined sua sponte that public policy reasons justify denying Bayer access to the state courts to pursue his statutory remedy in recovering taxes paid under protest on bookmaking transactions. In the case at hand, Bayer v. Payne, 411 N.W.2d 129 (S.D. 1987), (A-2), the South Dakota Supreme Court relied on Bayer III to again deny Bayer access to the state courts to recover sales tax paid on bookmaking transactions.

On October 5, 1987, this Court denied Bayer's Petition for Certiorari in Bayer III. On October 29, 1987, Bayer filed a Petition For Rehearing of Order Denying Petition For Writ of Certiorari. The majority and dissenting opinions in Bayer v. Payne, id., and the anticipated filing of this petition provided the primary grounds for that petition for rehearing.

Bayer again contends that the South Dakota Supreme Court's decision to deny him access to the courts to recover taxes paid on bookmaking transactions violates the United States Constitution and is in conflict with decisions of this Court. For these reasons, Bayer requests that this Petition for Certiorari be granted.

B. Refusing Bayer Access to the Courts to Pursue a Tax Refund, In Effect, Constitutes a Forfeiture.

The South Dakota Supreme Court's public policy decision to deny Bayer access to the courts to recover the taxes

in issue operated, in effect, as a forfeiture. In United States v. U.S. Coin & Currency, 401 U.S. 715 (1920), this Court declined to decide the case on the issue of whether the federal forfeiture statute in issue violated the Fifth Amendment's command that no person shall be deprived of property without due process of law. The Court stated, however, that when the federal forfeiture statutes are viewed in their entirety, they obviously intend to impose a penalty only upon those significantly involved in a criminal enterprise. In United States v. One 1936 Model Ford, 307 U.S. 219 (1939), this Court stated that forfeitures are not favored and should be enforced only when such forfeitures are within both the letter and spirit of the law.

The South Dakota Legislature has provided that a conviction for a public offense will not work a forfeiture except

where a forfeiture is expressly imposed by law. S.D. Codified Laws Ann. §23A-27-2 (1979). State statute does not impose a forfeiture of property associated with bookmaking. In fact, as the Supreme Court has conceded, "it is not completely clear whether bookmaking would be a criminal offense under the South Dakota Code." Bayer v. Johnson, 400 N.W.2d 884, 886 (S.D. 1987). Also, it is clearly not a crime to fail to file retail sales and service tax returns on bookmaking operations. The South Dakota Supreme Court held in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984), that Department violated the South Dakota Constitution by collecting a tax on bookmaking operations.

The South Dakota Supreme Court based its public policy determination in Bayer III on its conclusion that bookmaking is unconstitutional and possibly illegal. The court relied on South Dakota case law

in which the courts refused to lend their aid to plaintiffs whose claim or right to recover depended on a transaction deemed malum in se or prohibited by statute.

The majority's rationale in Bayer III and this case is faulty since the South Dakota Constitution does not declare bookmaking illegal or unconstitutional, but merely prohibits the legislature from authorizing such activity. The cases relied upon by the majority involve transactions that were in and of themselves illegal, while the underlying transaction in the case at hand involves payment of taxes.

This Court has held that acquittal on criminal charges involving contraband does not bar a subsequent in rem forfeiture proceedings against the same contraband. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The subsequent forfeiture, however, is clearly

based on unlawful conduct, but a different standard of proof applies. In the case at hand, the existence of unlawful conduct is uncertain. The South Dakota Supreme Court itself acknowledged that "it is not completely clear whether bookmaking would be a criminal offense under the South Dakota Code." Bayer v. Johnson, 400 N.W.2d 884, 886 (S.D. 1987). To refuse Bayer access to the courts to seek a refund of the taxes he was ordered to pay is to deprive him of his property without due process of law in violation of the Fifth Amendment.

C. The Denial of a Remedy Constitutes a Taking of Property Without Due Process of Law.

This Court has long recognized that a taxpayer may recover taxes illegally assessed and paid if the taxpayer causes the collector to understand that the taxes are regarded as illegal and that the taxpayer will act to compel a refund.

Erstine v. Van Arsdale, 82 U.S. 75 (1872). This Court has also recognized that a state or an agency of the state acts arbitrarily and without due process of law when it collects taxes by coercion and without authority and then refuses to pay back the taxes to the taxpayer. Ward v. Board of County Comm'rs, 253 U.S. 17 (1920). See also Miller Bros. Co. v. Maryland, 347 U.S. 340 (1950); Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912); Arkansas Bldg. & Loan Ass'n v. Madden, 175 U.S. 269 (1899).

The federal guaranty of due process of law extends to state action through the judicial as well as through the legislative, executive or administrative branches of government. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). In Brinkerhoff-Faris Trust & Savings Co. v. Hill, id., a taxpayer brought suit in a Missouri court to enjoin

a county treasurer from collecting taxes assessed against him. The Supreme Court of Missouri denied the taxpayer relief because the taxpayer did not seek an administrative remedy which, in fact, was never available. This Court held that the Supreme Court of Missouri, by denying the taxpayer the only remedy available for the enforcement of its right to prevent the seizure of its property, deprived the taxpayer of its property without due process of law. In so holding, the Court stated, "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 281 U.S. at 682.

At the time Bayer paid the taxes in issue, he did so under the threat of

imprisonment. Pursuant to the terms of the plea agreement, Bayer was incarcerated in the county jail. When the threat of imprisonment was removed, Bayer timely sought the refund of the taxes.

In State v. Bayer, 378 N.W.2d 223 (S.D. 1985), (Bayer II), (A-33), the court held that the money paid by Bayer to Department pursuant to the 1981 plea bargain was not a fine which could arguably be returned to Bayer under the case law of South Dakota. After holding that the money was simply unpaid sales tax, the court concluded that: "Our legislature has provided an exclusive means for recovery of sales taxes paid and requires that jurisdiction is absent if the procedure established is not strictly followed." Id. at 224. After Bayer then followed the statutory procedure for recovery of sales tax, the court relied on its holding in Bayer III to bar Bayer from

access to the courts on public policy grounds.

The Department, with the aid of the South Dakota Supreme Court, acted arbitrarily and without due process of law when it collected the taxes by coercion and without authority and then refused to pay back the taxes to Bayer. As the dissenting opinion characterized the situation: "the State's quest for illicit money elevated over our state constitution, federal constitution, sound criminal procedure, state statutes, and case precedent." State v. Bayer, 378 N.W.2d 223, 228 (S.D. 1985) (Henderson, J., dissenting).

C. By Raising the Public Policy Issue Sua Sponte in Bayer III the State Supreme Court Unconstitutionally Denied Bayer Access to the Courts Contrary to Due Process.

Due process normally requires that an individual be granted an opportunity for a hearing at a meaningful time and in a

meaningful manner prior to being deprived of any property interest. Boddie v. Connecticut, 401 U.S. 371 (1971); Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane V. Central Hanover Bank & Tr. Co., 339 U.S. 306 (1950); but see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (under extraordinary situations, due process requirements are met by permitting seizure prior to notice and hearing). The essence of a hearing "demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." Londoner v. Denver, 210 U.S. 373, 386 (1908), quoted in Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1, 43 n. 17 (1978).

The South Dakota Supreme Court raised the issue of public policy sua sponte in Bayer III. Bayer never had the

opportunity to present argument on the public policy issue prior to judgment being handed down against him.

Bayer was entitled to present argument regarding the public policy issue. Even if these cases involved an authorized forfeiture, the due process requirements of the Fourteenth Amendment were not met because the court in raising the public policy issue sua sponte did not give Bayer notice and an opportunity to present his objections. See Robinson v. Hanrahan, 409 U.S. 38 (1972). The public policy rationale of the majority is without fair and substantial support. As such, the court's decision is not based on valid state grounds so as to defeat the jurisdiction of this Court. Wolfe v. North Carolina, 364 U.S. 177 (1960); National Ass'n for the A.C.P. v. Alabama, 357 U.S. 449 (1958); Ward v. Board of County Comm'rs, 253 U.S. 17 (1920). As

such, this public policy decision should not be allowed to deprive Bayer of property without due process of law.

D. The South Dakota Supreme Court Decisions In This Case and Bayer III Encourage Violation of State Law.

South Dakota statutes require that a taxpayer pay potential sales tax when due and thereafter seek recovery. S.D. Codified Laws Ann. ch. 10-55A (1982). The South Dakota Supreme Court describes Bayer's bookmaking transactions as "possibly criminal activity" which justifies denying Bayer access to the courts to recover taxes wrongfully collected on such activity. Bayer v. Johnson, 400 N.W.2d 884, 886 (S.D. 1987). Justice Henderson's dissent in this case contends that Bayer III projects the message to other taxpayers to violate state law and withhold payment of a tax rather than pay the tax under protest when

the criminal status or constitutionality of a taxed activity is in issue. (A-17).

In Gondeck v. Pan Am World Airways, 382 U.S. 25 (1965), this Court, in granting a successive petition for rehearing, noted that the lower court in issue had subsequently expressed doubt whether its decision was consistent with a United States Supreme Court decision. The two dissenting justices in this case expressed more than doubt as to the correctness of the decision and reliance on the State Supreme Court's decision in Bayer III. Justice Morgan's dissent characterizes the decision in Bayer III as "an ill-conceived and ill-advised decision that should be overruled." (A-6). Bayer maintains that special and important reasons exist for this Court to review this case.

CONCLUSION

In this case, the South Dakota

Supreme Court relied on its earlier decision in Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987), (Bayer III), to deny Bayer access to the state courts to recover tax paid pursuant to a plea bargain arising out of charges for failure to pay retail sales and service tax returns on bookmaking operations. The Judgment of Conviction was vacated after the South Dakota Supreme Court determined that pursuant to the State Constitution, the Department lacked the power to tax bookmaking.

In Bayer III, the South Dakota Supreme Court, without fair and substantial support, determined sua sponte that public policy justified denying Bayer access to the courts to recover taxes paid under protest by him on bookmaking activities. Reliance on the Bayer III decision results in a continuing violation of Bayer's rights of due process. The

decision of the South Dakota Supreme Court in this case is also in conflict with applicable decisions of this Court. For these reasons, Bayer respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted this 17th day of November, 1987.

HAGEN & WILKA, P.C.

By Joel T Hagen

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CERTIFICATE OF COUNSEL

Pursuant to Rule 51, I hereby certify that the foregoing Petition for Writ of Certiorari is presented in good faith and not for delay and is restricted to grounds specified in Paragraph 2 of Rule 51 of the Supreme Court Rules.

HAGEN & WILKA, P.C.

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APPENDIX

APPENDICES

A. Opinion of the South Dakota Supreme Court issued August 19, 1987 . . A-2

B. Memorandum Decision of the Circuit Court for the Second Judicial Circuit dated October 9, 1986 . . . . . A-20

C. Order of Dismissal from the Circuit Court for the Second Judicial Circuit dated December 22, 1986 . . . . A-27

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APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

BAYER E. BAYER,
Petitioner and Appellant,

v.

JUDITH PAYNE, Secretary of
Revenue for the State of
South Dakota,
Respondent and Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

* * * *

HONORABLE RICHARD D. HURD
Judge

* * * *

Considered on Briefs May 19, 1987
Opinion Filed August 19, 1987

Bayer E. Bayer (Bayer) appeals from an order dismissing his suit for the recovery of sales taxes paid on his bookmaking activities. We affirm.

FACTS

Bayer's sales tax problems can be traced to a July 12, 1981, criminal complaint alleging failure to file retail sales and service tax returns on his bookmaking operations. This complaint was disposed of by a July 13, 1981, plea bargain. As part of the plea bargain Bayer was to pay the tax, penalty and interest, keep adequate records, and pay taxes in the future based on his gross receipts.

Pursuant to the plea bargain, Bayer did pay some sales tax. A dispute arose, however, on whether the tax was to be paid on gross receipts, the "vigorish," or the service fee. This dispute came before the court in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984) (Bayer I). We declined to consider that issue and instead held that the collection of sales tax on bookmaking activities is not authorized because it

would be an implicit recognition of bookmaking. A recognition of bookmaking is not allowed under the South Dakota Constitution.

With Bayer I in mind, Bayer sought the return of the sales taxes he paid on bookmaking activities. This resulted in State v. Bayer, 378 N.W.2d 223 (S.D. 1985) (Bayer II). In Bayer II, we held that a magistrate did not have the jurisdiction to return sales tax paid pursuant to a plea bargain. The recovery of sales tax must be exclusively pursued through the laws passed by the legislature.

Bayer, not to be discouraged, then filed suit in Hughes County Circuit Court seeking recovery of the tax under statutes passed by the legislature. Bayer v. Johnson 400 N.W.2d 884 (S.D. 1987) (Bayer III). In Bayer III we stated that "[s]ince the payments were made upon an unconstitutional activity, . . . Bayer

cannot recover." Bayer III, supra, 400 N.W.2d at 886. We based our decision upon public policy, holding that "Bayer is denied access to the courts to recover these taxes paid to engage in an unconstitutional and possibly criminal activity." Id.

With this background in mind, we now turn to the case at bar.

DISCUSSION

Bayer brought this suit in Minnehaha County Circuit Court seeking the refund of the sales tax he paid on his bookmaking activities. This is the same sales tax that was at issue in Bayer II and Bayer III.

Like Bayer III, Bayer bases his suit upon the tax recovery statutes found in the South Dakota Codified Laws. In essence, the case at bar is identical to that presented in Bayer III.

We hold that our decision in Bayer III is controlling, and all the issues presented here are res judicata. The dismissal by the trial court is affirmed.

WUEST, Chief Justice, and SABERS, Justice, concur.

MORGAN, Justice, and HENDERSON, Justice, dissent.

DOBBERPUHL, Circuit Judge, sitting for MILLER, Justice, disqualified.

MORGAN, Justice (dissenting).

I cannot join in the majority disposition of this appeal because it relies upon our earlier decision, Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987) (Bayer III), which I consider to be an ill-conceived and ill-advised decision that should be overruled.

The decision in Bayer III was grounded on the activities in which Bayer rendered the services that resulted in his

purported tax liability. As the majority stated: "Bayer's sales taxes paid under protest were based upon his business as a bookmaker. Since the payments were made upon an unconstitutional activity, we hold Bayer cannot recover." Id. at 886. The decision then went on to hold that because the taxes were paid to engage in an unconstitutional and possibly criminal activity, Bayer would be denied access to the courts.

Rather than reiterate my dissent[1] in Bayer III in extenso, I will merely summarize it with some additional comments. First, the only "unconstitutional" action was that of the legislature in enacting the provisions of SDCL 10-45-5.2, which imposed the sales or service tax on bookmakers in contravention

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1. Bayer v. Johnson, 400 N.W.2d 884, 887 (S.D. 1987).

of art. III, § 25 of the South Dakota Constitution, which prohibits the legislature from authorizing games of chance.

Secondly, on the issue of illegality of Bayer's activities, conceding that they were prohibited under the provisions of SDCL ch. 22-25, they were, on the other hand, blessed under the provisions of SDCL ch. 10-45 (the sales and service tax laws). As this court said in Bayer v. Johnson, 349 N.W.2d 447, 449 (S.D. 1984) (Bayer I): "In licensing bookmaking as a service subject to a retail service tax, the legislature is effectively authorizing a game of chance and treating it as a legitimate source of revenue." (Emphasis added.) The Bayer III decision apparently concedes this dilemma when it said Bayer was engaging in "possibly criminal activities." (Emphasis added.)

Next, the authorities upon which the

Bayer III court relied for its so-called public policy position were totally inappropriate. The transactions involved in the premised authoritative cases were all illegal, in and of themselves. But, the payment of a service tax, even based on a clearly illegal activity, is patently one step removed from the illegal transaction itself.

Finally, I question the Bayer III determination that it is public policy to deny Bayer access to the courts under the circumstances that were present. Here, I find a most persuasive statement of public policy in the South Dakota Constitution, art. VI, § 20, the so-called open courts provision.[2] Couple that with the

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2. "All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay."

provisions of art. III, § 27, providing for suits against the state and the legislative enactment of SDCL ch. 10-55A, and its predecessor ch. 10-55, providing for the recovery of taxes wrongfully paid (tax refund provisions), and I think that the Bayer III majority was presumptuous in determining that Bayer should be denied access to the courts "as a matter of public policy."

This action involves only the $46,000 or so that Bayer paid under the threat of imprisonment in the criminal proceedings before the magistrate's court. Bayer III involved those payments plus some additional payments. The trial court, in this case, did not rely on Bayer III and the doctrine of res judicata, but rather decided against Bayer on the grounds that the three-year statute of limitations, SDCL 10-45-53, had run. It further determined that the statute of limitations

was not tolled because, although the payments made pursuant to the plea bargain were compulsory, Bayer was not precluded from seeking recovery pursuant to the provisions of the tax refund provisions.

If Bayer III stands, as I have no doubt it will, the trial court is probably correct in its analysis; but, if Bayer III is overturned as I fervently believe it should be, I would hold the trial court in error. In State v. Bayer, 378 N.W.2d 223 (S.D. 1985) (Bayer II), Bayer first tried to recover this money by refund through the criminal court system, through which it was exacted. In Bayer II, we held that was improper, but that he should seek relief through the tax refund procedure. His action in Bayer III was clearly in response to that directive, but ran afoul of both the Department of Revenue and the circuit court when he refused to incriminate himself by admitting that he

was a bookmaker; the aegis of the tax statute having then been struck down as unconstitutional. The Bayer III decision dispensed with that problem by invoking the law of the case doctrine; but, then, the public policy aberration set in.

I would, therefore, overrule our decision in Bayer III and reverse the trial court below upon the grounds that Bayer had indeed, in timely fashion, sought restitution of the taxes illegally and unconstitutionally exacted by the Department of Revenue and the magistrate's court.

HENDERSON, Justice (dissenting).

First, I join, spiritually, the dissent of Justice Morgan. This dissent is not intended to disparage nor contravene his writing.

Needless to say, as the author of Daugaard v. Baltic Co-op. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984), I find

it difficult to intellectually swallow the public policy declaration to deny Bayer access to the courts of this state.[1] Daugaard, though assailed in a dissent in this Court, was later approved in Zacher v. Budd Co., 396 N.W.2d 122 (S.D. 1986). See Salem Sch. Dist. v. Puetz Constr., 353 N.W.2d 51 (S.D. 1984). See also Wright v. International Harvester Co., 736 F.2d 483 (8th Cir. 1984) (per curiam). Pridefully, it is called to the attention of the reader that the words of Daugaard were approved by the Supreme Court of Arizona in Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) (en banc), and the Supreme Court of Utah in Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985). Zacher, 396

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1. Article VI, § 20, of the South Dakota Constitution manifests the intention of our forefathers that this state's courts shall remain open for an injury done to a man's or woman's property, person, reputation.

N.W.2d at 131.

Justice Morgan notes that these taxes were unconstitutionally exacted by the Department of Revenue. I agree. In this regard, I wish to point out to the reader my dissent in Bayer II, 378 N.W.2d 223, 225 (S.D. 1985). I was the lone dissenter in Bayer II. Four captions containing four different subjects were highlighted in my dissent as to why the State of South Dakota was so wrong in its exaction of this money. One of those concepts was "UNCONSTITUTIONAL CONVICTION CANNOT BEGET CONSTITUTIONAL TAX MONEY." Id.

Referring to my dissent in Bayer II, 378 N.W.2d at 225, I wish to call State v. Piekkola, 90 S.D. 335, 241 N.W.2d 563 (1976), to the attention, once again, of students of the law. In sum, the case holding is that a fine and costs paid by an individual, convicted under an unconstitutional statute, constitutes a

violation of taking one's property without due process of the Fifth Amendment. Here, glaringly, Bayer being denied access to the courts, when he seeks a refund of a sales tax paid pursuant to a plea agreement on an activity not subject to a sales tax under the South Dakota Constitution, amounts to a taking of his property without due process. Failing to return a fine and costs collected from any individual pursuant to an unconstitutional conviction, is a violation of the Fifth Amendment. United States v. Summa, 362 F.Supp. 1177 (D.Conn. 1972); United States v. Lewis, 342 F.Supp. 833 (E.D. La. 1972), aff'd, 478 F.2d 835 (5th Cir. 1973); Ex Parte McCurley, 412 So.2d 1236 (Ala. 1982), cert. denied, 456 U.S. 1006; People v. Meyerowitz, 61 Ill.2d 200, 335 N.E.2d 1 (1975).

As regards "possibly criminal activity," referred to in the Bayer III

decision, 400 N.W.2d at 886, emphasized in Justice Morgan's dissent, I would like to point out that the only criminal action filed against Bayer was for failure to file a sales tax return. Said criminal conviction was vacated on August 13, 1984, as a direct consequence of Bayer I.

Particularly disturbing to this author is the "public policy" argument for still another reason: Potential sales taxes due must be paid under the scheme of SDCL ch. 10-55A. SDCL 10-55A-3 mandates a taxpayer to pay taxes when due and thereafter seek recovery as provided in SDCL ch. 10-55A. The statute is rough and tough in that it precludes the Court System from either restricting or delaying the collection of payment of sales tax. The message is clear: Pay the potential tax, Mr. Taxpayer, and then file a claim with the Department for a refund. SDCL 10-55A-2. Bayer entered into a Plea

Agreement, approved by the court, and followed the terms of the Plea Agreement and paid the sales tax allegedly owed to the State because of the criminal conviction. The majority continues to misunderstand and misapprehend and recognize this salient fact: His conviction has been vacated. Therefore, when this Court relies upon "public policy" to preclude Bayer from recovering a sales tax refund, the decision will ring out a message to other taxpayers to withhold payment of a tax if there is any question at all concerning the constitutionality of the taxed activity. Bayer had a tremendous dilemma: He could pay the sales tax in question via a Court Order as reflected in an instrument "Terms of Plea and Appropriate Disposition," and thereby be denied access to the courts to recover the taxes paid, or to simply not pay the sales tax at all and then be

incarcerated behind bars.

Let there be no doubt that Bayer was under duress. He was actually confined contrary to the South Dakota Constitution for failure to file a retail and service tax return. Duress is defined under SDCL 53-4-3. Five definitions of duress are specified. Taxes paid under duress or coercion are not subject to the three-year statute of limitations specified in SDCL 10-45-53.[2] Bayer was unable to petition for a refund because of the Magistrate Court's sentence of July 13, 1981. He labored under this disability until the Magistrate Court vacated the Judgment of Conviction on August 13, 1984. Bayer did timely file this action within three years from August 13, 1984. An operation of a statute of limitations does

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2. SDCL 10-45-53 was repealed by 1986 S.D. Sess. Laws ch. 111, § 30.

not accrue until the time that the duress ceases to exist. See Pierce v. Estate of Haverlah, 428 S.W.2d 422 (Tex.Civ.App. 1968). In my opinion, Bayer's cause of action did not accrue until the Supreme Court of this State rendered its decision in Bayer v. Johnson, 349 N.W.2d 447, on June 13, 1984.

It would appear that the $46,407.56 in sales tax was paid under coercion and I would reverse the trial court with a remand to the Department of Revenue to pay Bayer his money which he was coerced into paying.

APPENDIX B

Circuit Court of the
Second Judicial Circuit
State of South Dakota
Minnehaha County Courthouse
Sioux Falls, South Dakota 57102
Telephone 605 339-6511

Richard D. Hurd
Circuit Judge

William D. Rockafellow
Court Reporter

October 9, 1986

Mr. John Dewell
Assistant Attorney General
500 East Capitol
Pierre, SD 57501

and

Tom Wilka
Attorney at Law
100 S. Phillips #418
Sioux Falls, SD 57102

RE: Bayer v. Payne

Dear Counsel:

On July 10, 1981, the Secretary of Revenue pursuant to SDCL 10-45-37 made a jeopardy assessment against Barry Bayer for sales tax due based on gross receipts of almost $600,000.00. Following that jeopardy assessment and on June 15, 1981,

a demand was made upon Bayer for the payment of tax. Upon his refusal to pay the tax a tax lien was filed in the office of the Register of Deeds of Minnehaha County and a Treasurer's Distress Warrant was obtained which the sheriff executed also on June 15, 1981, as per the Notice of Levy and the receipt of goods levied on. Subsequent thereto and on June 19, 1981, Bayer made application to this Court for a Writ of Prohibition and a Writ of Mandamus and on June 21, 1981, the Court issued its Alternative Writ of Prohibition in the case of Bayer v. Meierhenry et al, commanding that che Defendant Mark Meierhenry as well as the Secretary of Revenue, cease and desist from further proceedings and actions relating to the notice of jeopardy assessment and the distress warrant and notice of tax lien until further order of the court and ordering that a show cause hearing be held

before the court to determine why the defendant should not be absolutely retrained from further proceedings and all actions relative to Bayer. Thereafter a hearing was held in Rapid City, South Dakota, and this Court determined that the Secretary of Revenue and others had acted in excess of their jurisdiction and the powers conferred by law in failing to give the Applicant Barry Bayer notice and opportunity for hearing and appeal of the Secretary's determination of sales tax liability and the amount of the assessment and by failing to follow the statutory procedures of SDCL 10-45. Writs of this Court were complied with by all parties.

On July 12, 1981, a criminal complaint against Defendant Bayer was filed in Minnehaha County alleging failure to file retail sales and service tax returns within (sic) intent to evade the tax. Proceedings were commenced on that

charge which covered periods from the fall of 1980 through May of 1981. On July 13, 1981, a plea bargain was entered into between the State and Bayer and he pled guilty to two counts of failure to file and pay sales tax, a misdemeanor, and signed the plea bargain, terms of plea and appropriate disposition, which provided for a jail sentence, the payment of tax, penalty, and interest in installments, the keeping of adequate records and his satisfactory (sic) paying future tax based on his gross receipts. During the next two years while attempting to pay the tax Bayer made several motions and the Court granted leniency so far as the time frame in which the tax should be paid.

On a completely separate matter having to do with the amount of tax and not the fact of the tax, Bayer appealed a decision of the Secretary of Revenue as to the definition of "gross receipts" to the

South Dakota Supreme Court which held that if the gross receipts of Bayer were gambling receipts then they could not be taxed as it was an unconstitutional venture. Case of Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984). Bayer subsequently moved for dismissal of the Judgment of Conviction based on Bayer v. Johnson, supra. On August 13, 1984, the Magistrate Court vacated and dismissed the Judgment of Conviction. No appeal was taken from said Order.

Bayer then filed a Motion for Refund of Taxes, Penalties and Interest which were paid to the State of South Dakota pursuant to the Judgment of Conviction. After a hearing the Magistrate Court entered an Order directing the State of South Dakota and the Secretary of Revenue to pay to the Appellant the amount of $46,407.56, with interest from the date of the Order. The State appealed to Circuit

Court from the Order. The Circuit Court reversed.

The South Dakota Supreme Court held an (sic) appeal in State v. Bayer, 378 N.W.2d 223 (S.D. 1985) that the Magistrate Court did not have jurisdiction to authorize a refund of the monies paid pursuant to Bayer's plea agreement. The Court held as follows: "Our legislature has provided an exclusive means for recovery of sales tax paid and requires that jurisdiction is absent if the procedure established is not strictly followed. See SDCL 10-55-1, through -8 (effective through June 29, 1982) and 10-55A-1, through -11."

In April of 1986, Bayer filed a Petition for Recovery of Sales Tax Imposed Contrary to the South Dakota Constitution with the Department of Revenue. This Petition was filed to recover the sales tax paid by Bayer pursuant to the terms of

the Plea Bargain. Without hearing, the Department of Revenue summarily denied the Petition pursuant to its Order dated April 22, 1986.

The payments made by Bayer pursuant to the plea bargain were compulsory. However, the plea bargain did not prohibit Bayer from seeking recovery of said payment pursuant to SDCL 10-55-1, through -8 (effective through June 29, 1982) and 10-55A-1, through -11. Thus, the statute of limitations of SDCL 10-45-53 is applicable, and was not tolled.

In conclusion, Bayer's appeal is dismissed for want of jurisdiction.

Sincerely,

Richard D. Hurd
Judge

APPENDIX C

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS SECOND
COUNTY OF MINNEHAHA) JUDICIAL CIRCUIT

* *

BARRY E. BAYER, * CIV. 86-1310
Petitioner and
Appellant, *

vs. * ORDER OF
DISMISSAL

JUDITH PAYNE, *
SECRETARY OF REVENUE
FOR THE STATE OF *
SOUTH DAKOTA,
Respondent and *
Appellee,

* *

Based on the review of the briefs submitted by the Appellant and Appellee herein in this appeal from a decision of the Department of Revenue, and for good cause shown, it is hereby

ORDERED, that the appeal of Appellant Barry E. Bayer is hereby dismissed for want of jurisdiction.

Dated at Sioux Falls, South Dakota, this 22nd day of December, 1986.

BY THE COURT:
Richard D. Hurd
Circuit Court Judge

ATTEST:
ROGER D. MOAN, Clerk
By Betty Fokken, Deputy

APPENDIX D

STATE OF SOUTH DAKOTA)		DEPARTMENT OF
	:SS	REVENUE - OFFICE
COUNTY OF HUGHES	)	OF THE SECRETARY
IN THE MATTER OF THE PETITION FOR RECOVER OF CERTAIN TAXES ALLEGEDLY PAID CONTRARY TO SOUTH DAKOTA CONSTITUTION	)	ORDER

A Petition having been filed by Barry E. Bayer for the recovery of certain sales taxes allegedly paid to the State in violation of Article III, Section 25 of the Constitution of South Dakota, and the Secretary having reviewed the same and all files and records thereto appertaining, and having noted that the facts as alleged here are those facts and circumstances being involved and decided by the South Dakota Supreme Court on November 20, 1985, in the case of State v. Bayer, 378 N.W.2d 223 (S.D. 1985) q.v. and it further appearing that any payment made which is now alleged to be unconstitutional was not made under protest as required by law, and

it further appearing that no petition for the recovery of any taxes under the facts determined by the Supreme Court was filed within the time limits provided in SDCL 10-55 or 10-55A, and it appearing to the satisfaction of the Secretary that such requirements are jurisdictional in nature; NOW THEREFORE IT IS ORDERED, that the Petition for Recovery of Sales Tax Imposed Contrary to the South Dakota Constitution be DENIED.

DATED this 22nd day of April, 1986.

JUDITH M. PAYNE
Secretary of Revenue

SEAL

APPENDIX E

Appeal No. 15594

IN THE SUPREME COURT)
State of South Dakota) SS. August 19, 1987

Present: Chief Justice George W. Wuest and Justices Robert E. Morgan, Frank E. Henderson, Richard W. Sabers and Circuit Judge Eugene E. Dobberpuhl sitting for Justice Robert A. Miller, disqualified.

BARRY E. BAYER,)
Petitioner and)
Appellant,)
)
vs.)
)
JUDITH PAYNE,)
Secretary of Revenue)
for the State of)
South Dakota,)
Appellee.)

This Cause coming on to be heard upon the merits of the cause, oral argument having been dispensed with by the Court, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Order of the Circuit Court, within and for Minnehaha County,

appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:
George W. Wuest
Chief Justice

ATTEST:
Gloria J. Engel
Clerk of the Supreme Court
(SEAL)

APPENDIX F

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA,
Plaintiff-Appellee,

v.

BARRY E. BAYER,
Defendant-Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

* * * *

HONORABLE WILLIAM H. HEUERMANN
Judge

* * * *

JOHN DEWELL
Assistant Attorney General
Pierre, South Dakota

On the brief:
MARK V. MEIERHENRY
Attorney General
Pierre, South Dakota
Attorneys for plaintiff-appellee

THOMAS K. WILKA of
HAGEN & WILKA
On the brief:
KAREN E. SCHREIER
Sioux Falls, South Dakota
Attorneys for defendant-appellant

* * * *

ARGUED September 11, 1985
OPINION FILED November 20, 1985

FOSHEIM, Chief Justice

The circuit court reversed the magistrate's order to the South Dakota Department of Revenue (Revenue) to refund monies paid by Barry Bayer (Bayer) under terms of a plea agreement. Bayer appeals. We affirm.

In 1981 Bayer was charged with three felony violations of SDCL 10-45-49.1 for his failure to file sales and service tax returns related to his book-making business. Under a plea bargain, he pleaded guilty to two counts of failure to secure and hold a sales tax permit in violation of SDCL 10-45-48. Bayer was sentenced in magistrate court to ten days in the county jail; ordered to pay $62,500.00 for back taxes, penalties, and interest for the period July 1, 1979,

through April 1, 1981; and given probation under the conditions that he pay the agreed sum, adopt appropriate sales tax records, and have no violations of SDCL Ch. 10-45 nor commit any felonies.

Five days of the sentence were suspended. The schedule for payment of the taxes, penalties and interest was amended. Bayer has paid $46,407.56 of the $62,500.00 to the South Dakota Department of Revenue (Revenue).

Following this court's decision in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984) (Bayer I), the magistrate vacated the conviction on August 13, 1984. In Bayer I, we held that sales tax licensing requirements under SDCL ch. 10-45 could not constitutionally be applied to prohibited gambling activities.

Following the vacation of the judgment, Bayer moved the magistrate court for a refund of the sums he paid under the

plea agreement. The magistrate concluded that it had jurisdiction over the subject matter, that Revenue did not have jurisdiction to hear the claim, and that Bayer was entitled to a refund because the money was impermissibly collected by Revenue. The magistrate ordered Revenue to pay Bayer $46,407.56 plus interest at 15% from the date of the order.

The circuit court in reversing the magistrates order found that Bayer made no payments under protest of illegality; he continued to violate the state constitution with his gambling venture, and, accordingly, has waived his right to protest the voluntary plea agreement. The judge found that Bayer had "purchased the right to continue an unconstitutional [profitable] business" and so could not now "blandly demand his purchase price back from the law and [constitution]-abiding taxpayer." Finally, the circuit

court further ruled that the magistrate had neither duty nor right to order that Bayer be made whole.

The central issue presented on appeal is whether the magistrate had jurisdiction to order Revenue to repay Bayer money paid under terms of the plea agreement. We affirm the circuit court but on a different rationale. See Owens v. City of Beresford, 87 S.D. 8, 201 N.W.2d 890 (1972).

The money paid by Bayer to Revenue was either taxes, penalty and interest or it was paid as a fine. It had to be fish or fowl. If paid as a fine, it far exceeded magistrate court jurisdiction. SDCL 16-12A-6. It obviously was never contemplated as resembling a fine headed for the public school funds. See S.D. Const. Art. VIII, §3; SDCL 23A-27-25. The sentence clearly denominates the money as taxes, penalty and interest. At no time

were these sums considered fines or costs which arguably could be returned to Bayer pursuant to Bayer v. Piekkola, 90 S.D. 335, 241 N.W.2d 563 (1976). It was pure and simply regarded as unpaid sales taxes. Though SDCL 23A-31-1 retains jurisdiction for the magistrate court to correct an illegal sentence, it does not authorize refund of the monies paid pursuant to Bayer's plea agreement. Our legislature has provided an exclusive means for recovery of sales taxes paid and requires that jurisdiction is absent if the procedure established is not strictly followed. See SDCL 10-55-1, through -8 (effective through June 29, 1982) and 10-55A-1, through -11.

If we look closely at the agreed terms of the plea and appropriate disposition signed by counsel for both State and Bayer, we find that Bayer agreed to pay the taxes, penalties, and interest

for the period July 1, 1979, through April 1, 1981. These sums were to be remitted directly to Revenue. Finally, payment for that time period, in addition to continued compliance with South Dakota Sales Tax Laws, SDCL ch. 10-45, and adoption of appropriate sales tax records, were agreed terms of Bayer's probation. No appeal was taken from the magistrate's disposition.

We affirm.

MORGAN, Justice, WUEST and HERTZ, Acting Justices, concur.

HENDERSON, Justice, dissents.

HENDERSON, Justice (dissenting).

UNCONSTITUTIONAL CONVICTION CANNOT BEGET CONSTITUTIONAL TAX MONEY

A physiognomic appraisal of the majority opinion reveals a tidbit of facial worth, but its external aspect obscures its weak inner character or quality which is premised upon a "let's

keep the money for state government" philosophy. This decision condones the retention of money by the sovereign under an unconstitutional conviction. In any man's book, that is bad government. See United States v. United States Coin & Currency, 393 F.2d 499 (7th Cir. 1968), aff'd, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971), wherein said Circuit Court of Appeals, obviously affirmed by the United States Supreme Court, held that money ordered forfeited because used in violation of federal tax statutes, be returned to the defendant whose conviction for violation of the tax statutes (engaged in wagering business) could not stand because of violations of the Fifth Amendment. If the majority opinion wishes to rationalize that the above-referenced authority is not applicable because of a difference in federal and state law, the same rationale, by analogy, still applies;

the sovereign should not be permitted to retain money stemming from a conviction which has been determined to be unconstitutional. Although this Court has set aside an unconstitutional conviction, this Court is still permitting a forfeiture. Where, in the majority opinion, are state statutes cited which permit and allow the forfeiture of this money? It is wrong that a branch of government would indulge in upholding an unconstitutional system of criminal procedure. As the defendant's conviction has been swept aside, in toto, so far as the law in this state is concerned, he is innocent. A conviction under an unconstitutional statute is a nullity. State v. Piekkola, 90 S.D. 335, 340, 241 N.W.2d 563, 565 (1976); State v. Dove, 75 S.D. 460, 464, 67 N.W.2d 917, 919 (1955).

I wish to conclude this section by quoting Chief Judge Blumenfeld, as did

Justice Winans in State v. Piekkola, 241 N.W.2d at 565, as follows:

> "There is little doubt that equity compels the decision reached in this case. 'While there are no means available to compensate a person who has been imprisoned for violating a statute that is subsequently found constitutionally void and retrospectively applied, there is always a means for such a person to recoup his losses when the loss takes the form of a monetary fine. The Fifth Amendment prohibition against the taking of one's property without due process of law demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of prosecution.' United States v. Lewis, supra, 342 F.Supp. [833] at 836." United States v. Summa, 1972, 362 F.Supp. 1177 (D.Conn.) (Emphasis supplied mine.)

The State of South Dakota proceeded personally against Barry E. Bayer; the State of South Dakota never proceeded

against the money in rem; the State of South Dakota has shifted its position, and so has this Court, since the original criminal proceeding and this Court's pronouncement in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984).

LAW OF THE CASE VIOLATED

In Bayer, id. at 450, we held:

> In 1970 the people of South Dakota amended Article III, Section 25 of our constitution by adding a proviso authorizing games of chance by public-spirited organizations. If it be the will of the people to license, tax and thus authorize privately operated games of chance, that likewise requires further amendment. It cannot be done by the legislature. (Emphasis supplied.)

Let it be remembered that in Bayer, the appeal was taken from a decision of the Secretary of Revenue which denied a bookmaker's application for refund of sales tax paid under protest. This Court held that the State Legislature could not tax privately operated games of chance.

Therefore, under the law of the case doctrine, and upon that theory alone, the majority opinion has bad physiognomy (fair by external aspect but weak by inner character or quality in reasoning). Therefore, it is most obvious that the subject in Bayer was the refund of sales tax paid under protest. The message of Bayer is clear: A citizen, not subject to sales tax laws, cannot be charged or convicted of not obtaining a sales tax license. The judgment, under Bayer and Article VI, §18, is void as a matter of law.

STATE SHOULD NOT BE PERMITTED TO RENEGE ON ITS PLEA BARGAIN

South Dakota and defendant Barry E. Bayer, entered into a Plea Agreement, wherein and whereby three counts of a violation of SDCL 10-45-49.1 were dismissed with prejudice. Defendant Bayer agreed to plead guilty to two counts of

failure to secure and hold a sales tax permit in violation of SDCL 10-45-48. The magistrate division of the circuit court of the Second Judicial Circuit entered a judgment of conviction on July 13, 1981. Pursuant to the terms of the plea bargain and judgment of conviction, defendant Bayer remitted to the Secretary of Revenue of the State of South Dakota $46,407.56. Based upon this Court's holding in Bayer v. Johnson, 349 N.W.2d 447, that the judgment of conviction was void abinitio, the said magistrate division vacated and dismissed the judgment of conviction on August 13, 1984, pursuant to the mandate of the highest Court of this state. Additionally, the court had the inherent power to correct its judgment. The magistrate court corrected the judgment it wrongfully entered. The retroactive application of Bayer, by the magistrate court, in decreeing a return of the money

is supported by the highest authority in the land. See United States v. United States Coin & Currency, 401 U.S. at 724, 91 S.Ct. at 1046, 28 L.Ed.2d at 440-41. The magistrate court did its duty.

The State of South Dakota now seeks to keep the money under a void conviction, in its treasury, and refuses to abide by the lawful order of the very court in which it participated in a plea bargain. South Dakota has the legal audacity to renege on its plea bargain and to keep "unconstitutional money." Apparently, the last paragraph of Bayer, id., which I cited above, is meaningless. Furthermore, this type of inverted reasoning flies in the face of State v. Piekkola, 241 N.W.2d 563. All payments of money to be made by the said Barry E. Bayer, defendant, were made pursuant to a void judgment which had incorporated a written plea agreement. The payment of money under the judgment

was subsequently subject to motions and hearings in which the State of South Dakota took part. South Dakota was deeply involved in compromising, bargaining, and securing money on an unconstitutional conviction. These were hearings in the form of a "reduction in sentence" and the State of South Dakota, pursuant to these hearings on a "reduction in sentence," received money under the void judgment.

There can be no doubt that the judgment herein was a sentencing and criminal judgment which sentenced the defendant, Barry E. Bayer, to imprisonment in the county jail of Minnehaha County, at Sioux Falls, South Dakota, for a period of ten days. Five days Bayer served ~~in~~ jail--those cannot be returned, but the money exacted can be returned to him. It was either go to jail for Barry E. Bayer or pay an original assessment of $62,500 to the South Dakota Secretary of Revenue.

The judgment provided for a ten-day jail sentence, and to pay taxes, penalty, and interest from July 1, 1979 to April 1, 1981, of $62,500 in two equal installments; the first installment to be paid by July 31, 1981, and the second installment within 90 days of court approval. Five days of the jail term were suspended and the jail term was to be served if Bayer did not pay the taxes as agreed. Probation conditions included that all payments be made unto the South Dakota Secretary of Revenue and that Bayer have no like offenses. Wrapped together were the plea bargain, the tax assessment, the jail sentence, the probation conditions, and subsequent hearings and motions because Bayer could not produce the lump sum amount. Pursuant to the criminal judgment, and pursuant to the criminal plea bargain, defendant paid $46,407.56 and the State of South Dakota

accepted the money. South Dakota exacted "tribute" upon the premise that Bayer was a retailer. See SDCL 10-45-22. Refunds of sales tax money may only be claimed by the retailer and not by the individual customer. Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980). It was by this latter statute and South Dakota precedent that South Dakota sought to impose, and did impose, these taxes and infused them with a criminal conviction. Now, the State contends in its brief that Bayer is not the proper party to collect the money he paid. But, rather, inferentially, the bettors are the proper parties. The bettors will never come forth and South Dakota knows it and that is why this weak and corrupt argument is used. This was entirely a criminal proceeding below, not a civil proceeding, and the criminal judgment below has been held to be totally void. Thus, everything that grows out of

it is void. This Court took a lofty stance and sua sponte examined a patent constitutional dilemma in Bayer, 349 N.W.2d 447. We could not tolerate, we said, the licensing and the collection of a retail service tax on bookmaking activities. Now, we bless the very thing that we so loftily denounced in Bayer. If it was wrong in Bayer for the State of South Dakota to tax and receive money for licensing bookmaking activities, it is wrong for South Dakota to keep the money collected therefrom. "Requiring service tax licenses and exacting tribute, blind to the activity, is an implicit, if not formal recognition. It cannot be reconciled with Article III, Section 25 of our constitution." Bayer, 349 N.W.2d at 449 (emphasis supplied).

POWER OF TRIAL COURT TO CORRECT ILLEGAL SENTENCE

In State v. Tibbetts, 333 N.W.2d 440,

441 (S.D. 1983), this Court made a penetrating analysis of SDCL 23A-31-1. We distinguished the difference between "an illegal sentence which may be corrected at any time" and "a sentence imposed in an illegal manner" which may be reduced within prescribed time constraints. SDCL 23A-31-1 provides in part:

> A court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence. (Emphasis supplied mine.)

Thus, the magistrate court had the right, power, and duty to set aside and correct the illegal sentence which it had imposed on Barry E. Bayer and to serve, thereby, the express word and dictate of the highest Court of this state. Without any question, the magistrate court retained jurisdiction to correct the illegal sentence and it was reversible error for the circuit court judge to enter a

decision contrary to the Supreme Court mandate and the settled law and statutes of this state. As one can see by reading the majority opinion, the majority opinion does not fasten its decision on the circuit court's decision at all. It erupts with a "fish or fowl" bit of reasoning which is as far removed from the scene of relevant analysis as the judgment entered by the circuit court. The circuit court's decision was founded upon outrage, namely, the circuit court's outrage that Bayer should not be permitted to recover the money he paid pursuant to the plea bargain because he was in an unconstitutional, profitable business and had no legal standing in moral conscience to ask for the tax money back which he had paid pursuant to the plea bargain. From out of the blue, the circuit court ruled that an admitted violator (Barry E. Bayer) of the State constitution has come into

court "with unclean hands" and that he cannot "blandly demand" a "purchase price back from the law and constitutional-abiding taxpayer." (Whatever that means.) The circuit court judge based his decision further upon the fact that Bayer made no payments under protest (the circuit court failing to realize that this was a criminal proceeding and that the money was paid pursuant to a plea bargain), and "was and is violating the constitution" and has "accordingly waived his right to protest his voluntary agreement and that the magistrate court had neither the duty nor the right to make him whole." In other words, the circuit court is telling us that by making the payments under an unconstitutional conviction, defendant Bayer supposedly has "waived" his right to recover the tax money paid under the conviction. Not one supporting statute, case, secondary authority, or

constitutional citation is listed in the decision of the lower court. In the magistrate court, as distinguished from the circuit court, formal findings of fact and conclusions of law were entered with supporting statutes, law of the case citation, and pertinent South Dakota and United States Constitutional provisions. The Supreme Court of this state under its "fish or fowl" theory, bottoms its decision on a new theory, namely: that Bayer has waived or forfeited his right to a refund because he did not follow the procedure set out in SDCL ch. 10-55. This Court fails to recognize that the $46,407.56 was paid pursuant to a plea bargain and a criminal judgment of conviction, and it was not paid or tendered in any civil proceeding. Recovery of taxes under SDCL ch. 10-55 applies to the recovery of taxes which are paid pursuant to SDCL ch. 10-45. Here,

there was no constitutional sales tax imposed on the proceeds of the business of a bookmaker under SDCL ch. 10-45. For this Court to now hold that the magistrate court is without jurisdiction to refund this money, having determined that the convictions were unconstitutional and should be vacated below, is to, in effect, cast aside the criminal convictions per se but to uphold that aspect of the convictions which decreed the payment of tax money. Such reasoning runs afoul of the concluding language in Bayer, 349 N.W.2d at 450, which commands an amendment to the state constitution if privately operated games of chance are to be either licensed or taxed.

CONCLUSION

From the top of the Capitol dome to the innards of the Civil Defense Department deep in the inner recesses of the earth, I dissent. I would affirm and

reinstate the magistrate court's decision for the various rationale outlined above and for the principal reason that the money collected by the Department of Revenue pursuant to the guilty plea was constitutionally impermissible; and in violation of the South Dakota Constitution, Article III, §25; Article VI, §§17 and 18; and Article VI, §20; and likewise in violation of the Fifth and Fourteenth Amendments to the United States Constitution. With pride in my heart, I join the aureate, well-motivated Bayer decision to support the state constitution. With remorse for the result it has spawned via this decision, I respectfully dissent for I observe the State's quest for illicit money elevated over our state constitution, federal constitution, sound criminal procedure, state statutes, and case precedent. Exalted on high before, the state

constitution is now given superficial deference; the majority decision is based on reasoning not used by the circuit court, but, rather, upon sua sponte civil procedure which erupts and was never, at any time, employed in securing the criminal convictions and the tax money thereunder.

APPENDIX G

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS SECOND JUDICIAL
COUNTY OF MINNEHAHA) CIRCUIT

* *

STATE OF SOUTH DAKOTA, * CR. 81-

Plaintiff, *

vs. * TERMS OF PLEA AND

BARRY E. BAYER, * APPROPRIATE DISPOSITION

Defendant. *

* *

The Defendant having been charged with three counts of failure to file retail sales and service tax returns in violation of SDCL 10-45-49.1, the State of South Dakota, by its attorneys Mark V. Meierhenry, Attorney General, and Miles F. Schumacher, Assistant Attorney General, and the Defendant, by his attorneys Thomas K. Wilka and Burns, Hagen & Wilka, agree pursuant to SDCL 23A-7-8 that the plea and appropriate disposition in this matter shall be:

A. Plea

1. The State of South Dakota will move to dismiss with prejudice three counts of violation of SDCL 10-45-49.1 as set out in its Complaint dated June 12, 1981;

2. Defendant will plead guilty to two counts of failure to secure and hold a sales tax permit in violation of SDCL 10-45-48;

3. No further charges will be filed nor will any further assessments be made by or on behalf of the State of South Dakota arising out of or related to the June 10, 1981 Jeopardy of Assessment by the South Dakota Secretary of Revenue and the June 15, 1981 search of the Defendant by the State of South Dakota and the County of Minnehaha, and their agents; all records, tapes, documents, checks, receipts, publications, and cash taken in the June 15, 1981 search of Defendant shall be returned to Defendant forthwith.

B. Appropriate Disposition

1. Pursuant to the plea by Defendant, the Defendant shall be on probation through December 31, 1982,

pursuant to paragraph 3 below, and shall be incarcerated in the Minnehaha County Jail for a period of ten (10) days, commencing at any time prior to July 31, 1981;

2. The Defendant shall remit to the South Dakota Secretary of Revenue the sum of sixty-two thousand five hundred dollars ($62,500.00) for taxes, penalties and interest for the period July 1, 1979 through April 1, 1981; payment shall be made as follows: thirty-one thousand two hundred fifty dollars ($31,250.00) on or before July 31, 1981 and thirty-one thousand two hundred fifty dollars ($31,250.00) on or before the ninetieth day of the date of the adoption of this appropriate disposition by the Court;

3. The terms of probation herein shall be as follows: The Defendant shall make the payments as set out in paragraph 2 above; the Defendant shall demonstrate within thirty (30) days of the adoption of this appropriate disposition the adequacy of his sales tax records; and, the Defendant shall commit no like offenses, and like offenses

are defined as and limited to violations of SDCL Chapter 10-45 and felonies;

C. The plea and appropriate disposition set above are not severable.

Dated at Sioux Falls, South Dakota, this 13th day of July, 1981.

MARK V. MEIERHENRY,
ATTORNEY GENERAL

By: MILES F. SCHUMACHER
Assistant Attorney General
State Capitol Bldg.
Pierre, SD 57501

THOMAS K. WILKA
Burns, Hagen & Wilka
418 First Financial Center
Sioux Falls, SD 57102
Attorneys for Defendant

APPENDIX H

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS SECOND JUDICIAL
COUNTY OF MINNEHAHA) CIRCUIT
MAGISTRATE DIVISION

* *

STATE OF SOUTH DAKOTA, * CRM 81-1348

Plaintiff, *

vs. * ORDER

BARRY E. BAYER, *

Defendant. *

* *

Upon the Motion of the Defendant, Barry E. Bayer, with the above-captioned matter having regularly come on for hearing, on the 3rd day of August, 1984, at 8:30 o'clock a.m., pursuant to notice, said Motion being to vacate the Judgment of Conviction entered on or about July 13, 1981, which Judgment involved the license, and based upon all of the grounds alleged in the Motion, and the State having argued that the Motion was based upon the wrong procedure, and the Court having found that

the procedure used by the Defendant was correct, and the Court also having found, based upon Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984), that the Defendant had not waived any constitutional objections, and given the equity powers of this Court, and the Court's obligation to use said powers consistent with the Constitution of the State of South Dakota, it is hereby

ORDERED that the Judgment herein finding the Defendant guilty of two counts of failure to obtain a sales tax license is hereby vacated and a Judgment dismissing said charges is hereby entered.

Dated this 13th day of August, 1984.

BY THE COURT:
William D. Matheson

ATTEST:
ROGER D. MOAN, Clerk
By Donna Thorson, Deputy

APPENDIX I

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS SECOND JUDICIAL
COUNTY OF MINNEHAHA) CIRCUIT
MAGISTRATE DIVISION

* *

STATE OF SOUTH DAKOTA, * CR. 81-1348

Plaintiff, *

vs. * ORDER

BARRY E. BAYER, *

Defendant. *

* *

Upon the Motion of the Defendant, Barry E. Bayer, with the above-captioned matter having regularly come on for hearing, on the 5th day of September, 1984, at 11:00 a.m., pursuant to notice, said Motion being for a refund of taxes, penalties, and interest paid pursuant to the Judgment of Conviction and the Terms of Plea and Appropriate Disposition entered on or about July 13, 1981, said Judgment of Conviction being vacated on or about August 13, 1984, by the Court, and

based upon all the grounds alleged in the Motion, and the State having argued that the Court did not have subject matter to hear a claim in excess of $2,000 and that the Defendant failed to exhaust his administrative remedies, and the Court having found that it had jurisdiction to hear Defendant's claim and that the Defendant did not have to file an administrative claim, and the Court also having found based upon Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984) that the entrance of the plea of guilty was void ab initio and thus that the money collected by the Department of Revenue pursuant to the guilty plea was constitutionally impermissible and should be refunded to the Defendant, and furthermore that the money collected from Defendant by the Department of Revenue was collected in violation of the South Dakota Constitution Art. III, §25; Art. VI, §§17, 18; and Art.

VI, §20; and the Fifth and Fourteenth Amendments to the United States Constitution; it is hereby

ORDERED that the State of South Dakota and the Secretary of the Department of Revenue of the State of South Dakota, R. Van Johnson, pay to the Defendant Barry Bayer the amount of $46,407.56 with interest therein from this date at the rate of 15% as provided by law.

Dated at Sioux Falls, South Dakota, this 14th day of September, 1984.

BY THE COURT:
W. D. Matheson
Magistrate Judge

Attest:
ROGER D. MOAN, Clerk
By Anthony Deters, Deputy